IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

JOSE TRUJILLO, individually and on behalf of all others similarly situated, Plaintiff, vs. APPLE COMPUTER, INC., a California Corporation, and AT&T MOBILITY LLC, a Georgia Corporation, Defendants.	Case No. 1:07-cv-04946 THIRD SUPPLEMENTAL DECLARATION OF NEAL S. BERINHOUT IN SUPPORT OF AT&T MOBILITY LLC'S MOTION TO COMPEL ARBITRATION AND DISMISS ACTION

I, Neal S. Berinhout, hereby declare as follows:

1. I am employed by AT&T Mobility LLC ("ATTM") (formerly Cingular Wireless LLC ("Cingular")) as Associate General Counsel—Litigation. The following facts are of my own personal knowledge, and if called as a witness I could and would testify competently as to their truth.

2. In October 2007, I submitted a declaration in support of ATTM's motion to compel arbitration in this case. In that declaration, I stated that, "[a]ccording to ATTM's records, Mr. Trujillo purchased an iPhone at a retail store," and then described the materials that customers receive "[i]n the course of purchasing an iPhone from a retail store." I then stated that the "ATTM Terms of Service booklet, which contains the terms and conditions of wireless services, is also available in the store[.]"

3. That statement in my declaration implied that ATTM's Terms of Service booklets are available in Apple retail stores as well as ATTM retail stores. I submitted another declaration on May 5, 2008 in order to correct my October 2007 declaration because I had "been informed that the Apple store in Oak Brook, Illinois where Mr. Trujillo purchased his iPhone does not keep ATTM's Terms of Service booklets in stock."

Dockets.Justia.com

4. At the time I signed my October 2007 declaration, I believed that it was accurate in all respects. At the Court's direction, I submit this declaration in order to explain the circumstances that gave rise to the errors in my October 2007 declaration.

5. I have personal knowledge about ATTM's policies and standard practices with respect to arbitration and the manner in which customers agree to arbitration because I either participate in or advise groups within the company that set those policies and because I have been principally responsible for drafting various versions of the arbitration provision and developing the process by which the provision has been disseminated. In order to limit the costs and business disruptions that take place when ATTM responds to challenges to the arbitration agreements between ATTM and its customers, I decided to assume principal responsibility for attesting to various aspects of the formation and substance of these agreements. Accordingly, I served as the primary declarant in support of ATTM's motion to compel arbitration in this case.

6. At the time that I signed my October 2007 declaration, my understanding was that Mr. Trujillo had obtained his iPhone on July 5, 2007 from an ATTM retail store. In her declaration, Diane Bonina, the ATTM in-house lawyer responsible for this matter, explains the factual basis for our conclusion that the iPhone on which Mr. Trujillo had received wireless service from ATTM was purchased from an ATTM retail store.

7. I did not learn that Mr. Trujillo also had purchased an iPhone from an Apple retail store until he attached a receipt reflecting that information as an exhibit to his supplemental response to ATTM's motion to compel arbitration, which he filed on April 3, 2008.

8. At the time I executed my original declaration in October 2007, my understanding was that ATTM's Terms of Service booklets were to be available in all retail stores from which iPhones may be purchased, including Apple retail stores. My understanding was based upon my participation in the groups that, prior to the launch of the iPhone, set policies regarding the distribution of ATTM Terms of Service booklets. Accordingly, at that time, I believed my statement that the terms of service were available at the store to be accurate.

9. After counsel for Mr. Trujillo submitted to this Court a copy of a receipt indicating that Mr. Trujillo had purchased an iPhone from an Apple store, I investigated further with ATTM's Chief Marketing Counsel and the Associate General Counsel who oversees matters relating to iPhone policies. I understood as a result of that investigation that my earlier understanding that ATTM and Apple had adopted a joint policy that ATTM's Terms of Service booklets were to be available in all retail stores from which iPhones may be purchased, including Apple retail stores, was correct. I thus continued to believe that my statement that the terms of service were available at the store where Mr. Trujillo obtained his iPhone remained accurate.

10. After the Court's April 18, 2008 order instructing ATTM to submit additional information about how Trujillo could have obtained ATTM's terms of service from the Apple store in Oak Brook, Illinois, our lawyers investigated further and learned that the Apple store in Oak Brook, Illinois did not keep ATTM's terms of service in stock.

11. I have subsequently learned that there is not a joint Apple/ATTM policy requiring that ATTM's terms of service be available in Apple retail stores. Evidently, I either misunderstood the facts that had been conveyed to me or I was misinformed that this policy had in fact been implemented. Thus, contrary to my original understanding, a customer who purchases an iPhone from an Apple retail store does not obtain ATTM's terms of service in the store.

12. I also wish to correct two additional statements in my October 2007 declaration. In that declaration, I had stated that, "[i]n the course of purchasing an iPhone from a retail store, customers also receive an iPhone rate plan brochure and a separate document summarizing the activation process." I made that statement based on my assumption that Mr. Trujillo had purchased the iPhone that he activated from an ATTM retail store; customers who purchase iPhones from ATTM retail stores receive these items. I cannot state whether Mr. Trujillo would have received these documents when he purchased an iPhone in the Apple store in Oak Brook, Illinois on July 2, 2007.

13. In addition, in my October 2007 declaration, I had stated that ATTM's terms of service is available "online by going to http://www.wireless.att.com and clicking on 'Wireless Service Agreement' at the bottom of the web page." That is an accurate description of ATTM's web site as of the time that I executed that declaration. I have since been informed, however, that the "Wireless Service Agreement" link was not added to the bottom of the web page until September 2007 and that in July 2007, when Mr. Trujillo purchased an iPhone from an Apple store, the web site was as Harry Bennett describes it in his May 5, 2008 declaration in this case.

14. All of the remaining information in the October 2007 declaration, including the information regarding ATTM's dispute resolution procedures, is accurate.

15. I am deeply apologetic and embarrassed about my errors. It was never my intention to mislead the Court or opposing counsel.

16. I hope that the foregoing information adequately responds to the Court's concerns. I stand ready to provide additional information, and am prepared to personally appear before the Court, if the Court would find that helpful.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 14, 2008.

N. S. Bt

Neal S. Berinhout